July 2015

Mu'Min v. Virginia: Sixth and Fourteenth Amendments Do Not Compel Content Questions in Assessing Juror Impartiality

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MU'MIN V. VIRGINIA:[1] SIXTH AND FOURTEENTH AMENDMENTS DO NOT COMPEL CONTENT QUESTIONS IN ASSESSING JUROR IMPARTIALITY

INTRODUCTION

A trial judge's refusal to question prospective jurors in a capital murder case about the specific contents of the news reports to which they had been exposed does not violate a defendant's Sixth Amendment right to an impartial jury, or his Fourteenth Amendment right to due process.[2]

> Although precise inquiries about the contents of any news reports that a potential juror has read might reveal a sense of the juror's general outlook on life...such questions are constitutionally compelled only if the trial court's failure to ask them renders the defendant's trial fundamentally unfair.[3]

In *Mu'Min v. Virginia* the Supreme Court considered whether a trial court is constitutionally obligated to ask jurors who admitted exposure to prejudicial pretrial publicity to identify precisely what they had seen, read, or heard.[4] The Court conceded in *Mu'Min* that a criminal defendant may properly ask on *voir dire* whether a juror has acquired *any* information about the case, but in *Mu'Min* it narrowed this privilege to a mere entitlement to know whether a juror, based on his own self-assessment, can remain impartial despite previously obtained information.[5] Mu'Min objected to the court's refusal to allow individual *voir dire* of those jurors admitting to prior knowledge of the case.[6] However, his arguments fell short in view of the rule that juror questioning must be left to the sound discretion of the trial court.[7] Mu'min contended that the prospective jurors' knowledge, attitudes, and opinions about the case would aid the court in determining impartiality. [8]

This note synopsizes the Supreme Court's prior decisions regarding the adequacy of *voir dire* in capital cases surrounded by prejudicial pretrial publicity. This note will then discuss *Mu'Min* and explore the weaknesses in the Court's

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[1] 111 S. Ct. 1899 (1991).

[2] *Id.* at 1903-08.

[3] *Id.* at 1900 (citation omitted).

[4] *Id.* at 1908.

[5] *Id.*

[6] *Id.* at 1903.

[7] *Id.* at 1903-04.

[8] *Id.* at 1905.

analogies to its prior decisions. Next, the note will propose arguments in favor of mandating content questioning. Finally, this note will explore possible nonconstitutional reasons for requiring content questioning in cases where juror partiality should be presumed.

BACKGROUND

The American criminal justice system has long recognized the unreliability of jurors' assessments of their own impartiality in high publicity cases.[9] Foreshadowing the Supreme Court's concerns about jurors' self-assessments of partiality, Chief Justice Marshall, sitting as trial judge in *U.S. v. Burr*[10] noted the inherent danger of seating a prospective juror with preconceptions about the case to be tried. He observed that protestations of neutrality cannot be trusted.

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.[11]

This mistrust for juror self-assessments has continued to weave its way into the Court's decisions over the years since *Burr*. Further, growing media interference surrounding criminal trials has exacerbated this mistrust.[12]

It is well established in criminal jurisprudence that the Sixth and Fourteenth Amendments guarantee the criminally accused a fair trial by a panel of impartial, indifferent jurors.[13] The theory underlying this protection is that the jury's verdict in any case must be induced only by the evidence presented in open court, and not by any outside influences.[14] This right becomes even more pronounced

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[9] *See* United States v. Burr, 25 F. Cas. 49 (No. 14, 692g 1807).

[10] *Id.*

[11] *Id.* at 50.

[12] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). This federal habeas corpus petition considered the question of whether Sheppard was deprived of a fair trial after his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive, and prejudicial publicity that attended his prosecution. The Supreme Court concluded that he did not receive a fair trial consistent with Fourteenth Amendment due process.

[13] *See* Aldridge v. United States, 283 U.S. 308 (1931). The majority held that in putting questions to prospective jurors, court's restrictions upon inquiries at the request of counsel are subject to the essential demands of fairness. *See also* Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966); Patton v. Yount, 467 U.S. 1025 (1984). Likewise, the Due Process Clause guarantees a criminal defendant's right to an impartial jury. *See* Ristaino v. Ross, 424 U.S. 589 (1976).

[14] Smith v. Phillips, 455 U.S. 209, 217 (1982).

when the issue is one of life or death as in *Mu'Min*.[15]

The introduction of the media into the already appetizing atmosphere surrounding capital murder cases has provided an additional crucial element with which courts must contend in attempting to preserve a defendant's right to a fair trial. Courts must take greater pains to insure that when a defendant's life is at stake, he is tried in an atmosphere undisturbed by huge "wave[s] of public passion."[16] Hence, due process in capital cases requires a watchful trial judge eager to prevent prejudicial occurrences, and to determine the effect of such occurrences when they happen.[17] A defendant's guilt or innocence is never to be determined "on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[18]

Supreme Court's Analysis Of Sixth And Fourteenth Amendment Fair Trial And Impartial Jury Guarantees In High Trials

Thirty years ago in *Irvin v. Dowd*,[19] the Court considered a constitutional attack upon an alleged violation of due process. Irvin based his claim on the trial court's failure to protect him from a "carnival" atmosphere created by press coverage.[20] The Supreme Court vacated Irvin's sentence because the jury's partiality failed to accord him a fair trial under minimal due process standards.[21] As in *Mu'Min*, the crimes in *Irvin* gained extensive media coverage and aroused much excitement throughout the locality.[22] The exhibits presented at trial indicated that a barrage of newspaper headlines, articles, cartoons, and pictures were unleashed against Irvin during the months preceding trial.[23] The Court did not dispute that jurors need not be totally ignorant of the facts and issues involved. Rather, it found that it is sufficient if a juror can set aside his opinion and render a verdict based on the evidence presented in court.[24] The Court did, however, question the sufficiency of such a subjective rule in guaranteeing due

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[15] *Aldridge*, 283 U.S. at 314.

[16] *Irvin*, 366 U.S. at 728.

[17] *See* Ham v. South Carolina, 409 U.S. 524 (1973).

[18] Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

[19] 366 U.S. at 717.

[20] *Id.* at 720. The Court considered Irvin's habeas corpus petition in order to test the validity of his murder conviction and subsequent death sentence.

[21] *Id.* Irvin's conviction by an Indiana Circuit Court was confirmed by the Indiana Supreme Court. *See* Irvin v. State, 236 Ind. 384 (1958), 139 N.E.2d 898 (1958), *cert. denied*, 353 U.S. 948 (1958). The Court of Appeals upheld the validity of IND. CODE ANN. § 9-1305 (Burns 1956) as allowing a second change of venue in order to secure an impartial jury trial. Irvin v. Dowd, 251 F. 2d 548 (7th Cir. 1958), *rev'd*, 359 U.S. 394 (1959).

[22] *Irvin*, 366 U.S. at 719-20.

[23] *Id.*

[24] *Id.* at 723.

process. Accordingly, the Court announced its own test for insuring due process during *voir dire*: "whether the nature and strength of the opinion formed are such as in law necessarily...raise the presumption of partiality,"[25] with the burden placed on the defendant to show the actual existence of such an opinion.[26]

In *Irvin*, the presiding trial judge examined the members of the jury panel whom the petitioner insisted should be excused for cause. Each one indicated that, notwithstanding his opinion, he could render an impartial verdict.[27] Eight of the twelve jurors finally selected admitted that they thought petitioner was guilty, and that they could not give him the benefit of the doubt.[28] In light of these circumstances, the Court held Irvin's trial did not meet constitutional standards according to its "nature and strength" test,[29] and freed Irvin from his death sentence.[30] Though *Irvin* does not lay down a particular test or procedure for determining a juror's mental attitude, it does provide an important constitutional framework for assessing *Mu'Min*.

More than a decade later in *Murphy v. Florida*[31], another murder/robbery case involving extensive press coverage, the Court stretched the *Irvin* concepts. The Court concluded that a prospective juror's own assurances of impartiality cannot be dispositive of an accused's rights.[32] *Murphy* stood for the proposition that jurors' indicia of impartiality may be presumptively set aside in cases where the atmosphere in the community or courtroom is sufficiently inflammatory. In all other cases, any exposure to publicity about the defendant's prior convictions or current crime must be viewed with the totality of the circumstances to determine whether the trial was fundamentally unfair.[33] Contrary to the outcome in *Irvin*, the Court affirmed Murphy's conviction because none of the jurors exhibited an actual predisposition against him such as would suggest impermissible partiality.[34] However, the common thread running between *Irvin* and *Murphy* is clear: the defendants were permitted at *voir dire* to demonstrate the possible actual existence of any preconceived prejudices.

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[25] Reynolds v. United States, 98 U.S. 145, 156 (1878).

[26] *Id.* at 157.

[27] *Irvin*, 366 U.S. at 724.

[28] *Id.* at 728.

[29] *Id.*

[30] *Id.*

[31] 421 U.S. 794 (1975). The defendant's robbery and arrest received extensive press coverage because he had made himself notorious as "Murph the Surph", a flamboyant criminal known for the 1964 theft of the Star of Indiana. *Id.* at 795.

[32] *Id.* at 800.

[33] *Id.* at 799.

[34] *Id.* at 803. Of the 78 jurors questioned, only 20 (26%) were excused for having prejudiced petitioner. *Id.* at 796. In *Irvin*, 268 of the 430 (63%) were excused for having fixed opinions, suggesting that they were part of a community deeply hostile to the accused. 366 U.S. at 727.

In the fairly recent case of *Patton v. Yount*,[35] the Supreme Court once again followed the rule announced in *Irvin* requiring an evaluation of the actual pretrial publicity to determine the likelihood of an unfair trial.[36] Patton involved a three-year hiatus between petitioner's two trials.[37] The Court deemed this passage of time lengthy enough to clearly rebut any presumption of partiality or prejudice created by adverse publicity disseminated during the first trial.[38] The record showed that any prejudicial pretrial publicity existing prior to the first trial had greatly diminished four years later. Therefore, the trial court had not committed manifest error in finding that the jury as a whole was impartial.[39]

Supreme Court's Consideration of Presumed Prejudice

In the 1960's the Court decided two cases, *Rideau v. Louisiana*,[40] and *Sheppard v. Maxwell*.[41] In both cases the Court presumed juror prejudice because of pervasive media intrusion both in the community at large and in the courtroom. In *Rideau*, a twenty minute film of defendant's "confession" under police interrogation was broadcast three times by a television station in the community where the crime and trial took place.[42] In reversing, the Court did not even examine the *voir dire* for evidence of actual prejudice. It found that the "real trial" had already occurred when the 150,000 people in the community had seen and heard the defendant admit his guilt on camera.[43] The Court affirmed that these circumstances constituted a denial of Fourteenth Amendment due process.[44]

Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity, but also a courtroom given over to accommodate the public appetite for a carnival.[45] In *Sheppard*, the Court held that the failure of

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[35] 467 U.S. 1025 (1984).

[36] *Id.* at 1031.

[37] *Id.* at 1027. At the first trial, the Pennsylvania Supreme Court held that police had violated petitioner's constitutional rights by securing confessions that had been admitted into evidence. *Id.*

[38] *Id.* at 1027-28. At the second trial, defendant moved for a change of venue alleging that prejudicial information could not have been eradicated from the jurors' minds.

[39] *Id.* at 1040.

[40] 373 U.S. 723 (1963). The Supreme Court held that the trial court's refusal to grant a change of venue was a denial of due process. *Id.*

[41] 384 U.S. 333 (1966).

[42] *Rideau*, 373 U.S. at 724.

[43] *Id.* at 726.

[44] *Id.* at 727.

[45] Sheppard v. Maxwell, 384 U.S. 333 (1966). *See also* Estes v. Texas, 381 U.S. 532 (1965), wherein the trial was conducted in a circus atmosphere due in large part to the intrusions of the press which was allowed to sit within the bar of the court and to overrun it with television equipment. The Court held that this procedure inherently lacked due process. *Id.* at 542-44.

a state trial judge in a murder prosecution to protect the defendant from inherently prejudicial pretrial publicity, which saturated the community, deprived defendant of a fair trial consistent with due process.[46]

After *Patton*, *Sheppard*, *Murphy*, *Rideau*, and *Irvin*,[47] it appeared that the issue of content questioning during *voir dire* had, at the very least, a valid constitutional foundation.

The Racial Bias Cases

Though distinguishable on their facts, several race discrimination cases figure prominently in the analysis of *Mu'Min*. *Aldridge v. United States*[48] and *Rosales-Lopez v. United States*[49] involved black defendants and the right to examine jurors as to the existence of a disqualifying state of mind with respect to the black race. In both cases, the lower courts' refusals to permit such examinations were held to be error.[50] *Ham v. South Carolina*,[51] *Ristaino v. Ross*,[52] and *Turner v. Murray*[53] also involved black defendants. However, these cases stood for the proposition that merely because a defendant is black and the victim is white does not constitutionally mandate an inquiry into racial prejudice unless the facts suggest a significant 'likelihood that racial prejudice might infect the trial.[54]

STATEMENT OF THE CASE

Dawud Majid Mu'Min was convicted of murdering Gladys Nopwasky in Prince William County, Virginia. The murder occurred while he was out of prison on work detail under the supervision of the Virginia Department of Transportation(VDOT). The case engendered substantial publicity, and eight of the twelve venirepersons eventually sworn as jurors answered on *voir dire* that they had read or heard something about the case.[55] The publicity regarding

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[46] *Sheppard*, 384 U.S. at 363.

[47] 366 U.S. 717 (1961). Justice Frankfurter reflected the fervor of the idea in *Sheppard*. He stated...in his concurrence that "rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him." *Id.* at 729 (Frankfurter, J., concurring).

[48] 283 U.S. 308 (1931).

[49] 451 U.S. 182 (1981).

[50] *Aldridge*, 283 U.S. at 315; *Rosales-Lopez*, 451 U.S. at 189-90.

[51] 409 U.S. 524 (1973).

[52] 424 U.S. 589 (1976).

[53] 476 U.S. 28 (1986).

[54] *See, e.g.*, *Turner*, 476 U.S. at 30-32 (discussing *Ham* and *Ristaino*). *Turner* has been interpreted as pertaining to racial prejudice infecting the discretion afforded a jury at the sentencing phase of the capital trial.

[55] *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1901 (1991).

Mu'Min's crime was frequently front page news, the most incriminating of which told area residents that their local officials were already convinced of Mu'Min's guilt.[56] The media reports that were allegedly prejudicial contained information about Mu'Min's prior criminal record,[57] accounts of alleged prison infractions,[58] a comment that the death penalty had not been available at the time Mu'Min was first convicted,[59] and indications that he had confessed to killing Mrs. Nopwasky.[60] The articles also focused on the laxity in supervision of work gangs.[61] None of those who had read or heard something about the case and were eventually seated on the jury indicated that they had formed an opinion based on outside information, or that it would affect their ability to determine Mu'Min's guilt or innocence based solely on the evidence adduced at trial.[62]

Mu'Min was sentenced to death.[63] He appealed the conviction and sentence on nine separate grounds[64]to the Virginia Supreme Court. That court affirmed the decision. Mu'Min then petitioned for certiorari in the U.S. Supreme Court on the assertion that his Sixth and Fourteenth Amendment rights to an impartial jury trial and due process were violated when the trial judge refused to question prospective jurors about specific contents of news reports to which they had been exposed.[65]

The Supreme Court, speaking through Chief Justice Rehnquist, affirmed the Virginia Supreme Court's ruling.[66] The Court found that while a criminal defendant may properly ask on *voir dire* whether a juror has previously acquired any information about the case, the defendant does not have a constitutional right to explore the content of that information.[67] Rather, he is only entitled to know whether the juror can remain impartial in light of the previously obtained

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[56] *Id.* at 1912.

[57] Mu'Min was convicted of the 1973 murder and robbery of a cab driver. The media released a statement from the prosecutor to the effect that the death penalty was unavailable at the time of petitioner's earlier conviction. Brief for Petitioner at 6-7, Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (No. 90-5193).

[58] Mu'Min had 23 prison rule violation citations. *Id.* at 6.

[59] *Id.*

[60] *Mu'Min*, 111 S. Ct. at 1901.

[61] *Id.* at 1902.

[62] *Id.* at 1903. Four jurors were removed for cause by the trial judge: one equivocated as to her ability to remain open-minded; another showed signs of prejudice toward those of the Islamic Faith; another would have been unable to impose the death penalty, while yet another could not have considered a penalty less than death. *Id.*

[63] Mu'Min v. Commonwealth, 239 Va. 433, 443, 389 S.E.2d 886, 893 (1990).

[64] *Id.* at 439-53, 389 S.E.2d at 890-98.

[65] *Mu'Min*, 111 S. Ct. at 1903.

[66] *Id.*

[67] *Id.* at 1905-06.

information.[68]

The Majority Opinion

The Supreme Court divided its *voir dire* analysis of *Mu'Min* into two separate categories of cases: (1) those like *Aldridge* and *Rosales-Lopez* that were tried in federal courts, and therefore subject to the Court's supervisory powers;[69] and (2) those like *Ham*, *Ristaino*, and *Turner* that were tried in state courts, meaning that the Court's authority was limited to enforcing the United States Constitution.[70] The Court noted that in the former group of cases *voir dire* is conducted under the supervision of trial judges who rely largely on their immediate perceptions, and that their sound discretion necessarily controls.[71]

The Court first sought to distinguish *Aldridge* and *Rosales-Lopez* from *Mu'Min* on their facts. *Mu'Min* was not tried in a federal court, and therefore not subject to the Court's supervisory powers. The Court then responded to Mu'Min's two principle assertions: (1) "the Fourteenth Amendment requires more in the way of *voir dire* with respect to pretrial publicity than...it does with respect to racial... prejudice"[72]; and (2) "precise inquiries about the contents of any news reports" that jurors might have read would materially assist in obtaining an impartial jury.[73] However, contrary to Mu'Min's assertions, the Court seemed to think that the danger of racial prejudice in *Ham*, *Ristaino*, and *Turner* was more violative of the Fourteenth Amendment than the possibility of prejudicial pretrial publicity, and thus deserving of more *voir dire* than in *Mu'Min*. This contention justified *voir dire* inquiry regarding racial prejudice in the foregoing cases but not in *Mu'Min*.[74] Second, the Court also felt that the trial judge's conclusions as to impartiality, based on demeanor evidence and responses to questions, were not easily subject to appellate review.[75] Third, the Court rejected any constitutional requirement of content questioning despite the admitted benefits in aiding the exercise of peremptory challenges.[76] Content questions would only be constitutionally compelled if the trial court's failure to ask them

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[68] *Id.*

[69] Aldridge v. United States, 283 U.S. 308 (1931); Rosales-Lopez v. United States, 451 U.S. 182 (1981). Justice Rehnquist thought these cases gave the Court more latitude in setting standards for *voir dire* in federal courts under its supervisory power than it had under the Fourteenth Amendment with respect to state courts. *Mu'Min*, 111 S. Ct. at 1904.

[70] *See* Turner v. Murray, 476 U.S. 28 (1986); Ristaino v. Ross, 424 U.S. 589 (1976); and Ham v. South Carolina, 409 U.S. 524 (1973).

[71] *Mu'Min*, 111 S. Ct. at 1903-04.

[72] *Id.* at 1904.

[73] *Id.* at 1905.

[74] *Id.* at 1904-05.

[75] *Id.* at 1904.

[76] *Id.* at 1905.

had rendered Mu'Min's trial fundamentally unfair.[77]

The Court further reasoned that Mu'Min had misplaced his reliance on *Irvin*, positing that *Irvin* did not clarify the requisite extent of a trial court's *voir dire* inquiry.[78] Also, the Court pointed out that in *Irvin* eight of the twelve jurors had actually formed an opinion as to petitioner's guilt, which was not true of the jurors in *Mu'Min*.[79] Moreover, the Court deemed the actual publicity in *Irvin* more damaging than that found in *Mu'Min*.[80] Distinguishing *Mu'Min* from *Patton* as well, the Court again opined that the adverse publicity in *Mu'Min* was not so damaging as to create the presumption of prejudice permitted in *Patton*.[81]

The Court continued its criticism of Mu'Min's assertions by underscoring his misplaced reliance on the American Bar Association's Standards for Criminal Justice.[82] These rules require interrogation of each juror individually with respect to what he has seen and heard about the case. In the Court's opinion, the ABA standards for *voir dire* allegedly were constitutionally inapplicable because they rendered a potential juror subject to challenge for cause without regard to his state of mind.[83] The Court had not yet found the Constitution to require such a strict standard.[84] That a few states had adopted the ABA standards did not convince the Court to incorporate those rules into the Fourteenth Amendment due process requirements.[85]

Lastly, the Court examined the actual *voir dire* in *Mu'Min* and concluded that it was "by no means perfunctory[86] and adequately covered the subject of possible bias by pretrial publicity."[87] Had any of the jurors claimed to have a fixed opinion about the case, the Court may have then considered posing

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[77] *Id. See also* Murphy v. Florida, 421 U.S. 794, 799 (1975).

[78] *Mu'Min*, 111 S. Ct. at 1906-07.

[79] *Id.* at 1907.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1907-08. On selecting the jury, the standards read as follows: "Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability.... A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a *confession*, or other incriminating matters that may be inadmissible as evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind."

STANDARDS FOR CRIMINAL JUSTICE § 8-3.5 (b) (2d ed. 1980 & Supp. 1986) (emphasis added).

[83] *Mu'Min*, 111 S. Ct. at 1908.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

extensive questions to succeeding jurors.[88]

Justice O'Connor's Concurrence

Justice O'Connor interpreted *Mu'Min* within the narrow confines of *Patton*. She asserted that the issue before the Court was whether the trial court erred in crediting the assurances of the eight jurors that they could put aside what they had read or heard and render a fair verdict based on the evidence.[89] She supported the majority's deference to the trial court's discretion in weighing its own familiarity with the range of reported information against the jurors' assurances of their abilities to remain impartial.[90]

The Dissenting Opinion

1. Justice Marshall

Justice Marshall believed that the *Mu'Min* decision relegated the Sixth Amendment's guarantees to a "hollow formality."[91] He criticized the majority's reasoning as "unacceptable,"[92] suggesting instead that "a trial court cannot realistically assess the juror's impartiality without first establishing what the juror already has learned about the case."[93]

Justice Marshall considered the majority's evaluation of the publicity engendered in *Mu'Min* as meaningless in view of the fact that two-thirds of the seated jurors admitted to having read or heard about the case.[94] He described the barrage of publicity surrounding MuMin's case, emphasizing the political hotbed created by the government's admission of lax supervision over the corrections facilities.[95] He recited in detail the extent to which the public responded to the invitation for stiffer restrictions and better policies in the Virginia Department of Corrections.[96]

Justice Marshall's purpose in summarizing the specific news accounts was

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[88] *Id.*

[89] *Id.* at 1909 (O'Connor, J., concurring).

[90] *Id.* Though Justice O'Connor agreed with the majority she did concede the fact that the trial judge could have done more by asking the jurors to recount what they remembered reading about the case so as to observe their tone of voice or demeanor. *Id.*

[91] *Id.* at 1909 (Marshall, J., dissenting).

[92] *Id.* at 1910.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

to point out that anyone who read the reports would have come away with little doubt that Mu'Min was fully capable of committing the brutal murder of which he was accused.[97] He also wanted to stress that the real reason why the publicity surrounding *Mu'Min* was so highly prejudicial was its usefulness to the prosecutor in successfully securing the conviction of a detestable criminal.[98]

Justice Marshall clarified what he thought was the real issue in *Mu'Min*. He disagreed with the majority's contention that the Court was asked to determine merely the *procedures* necessary to assure the right to an impartial jury.[99] His prime contention was that once a prospective juror admits exposure to pretrial publicity, content questioning must be part of the *voir dire*. In his opinion, the trial court *must* do more than elicit a simple profession of open-mindedness before swearing the person onto the jury.[100]

He posed three reasons in support of his rule. First, content questioning is necessary to determine whether the type and extent of publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law, thereby creating a strong presumption of prejudice.[101] Second, relying heavily on *Irvin* and *Rideau*, Justice Marshall argued that content questioning was "essential to give legal depth to the trial court's finding of impartiality"[102] because jurors cannot know when asked whether they are impartial under the law.[103] Third, Justice Marshall viewed content questioning as a factfinding facilitator with regard to assessing juror credibility.[104] Justice Marshall labeled the majority's deference to the trial court's discretion as an attempt to substitute the actual knowledge of prospective jurors with the judge's subjective awareness of the surrounding publicity.[105]

The quintessence of Justice Marshall's analysis is that jurors' assertions of impartiality are insufficient to establish constitutional impartiality "when meaningful steps can be taken to insulate the proceedings from juror bias without compromising judicial efficiency."[106]

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[97] *Id.* at 1911.

[98] *Id.* at 1911-12. Justice Marshall cites a quotation by the local police chief who explained that "'[w]e haven't lost very many [murder cases] lately.'" *Id.* at 1912.

[99] *Id.* His disagreement with the majority on this point eliminated any need to consider the racial-bias cases and the extent to which they may have comparably required content questioning.

[100] *Id.* at 1913-15.

[101] *Id.* at 1913.

[102] *Id.* at 1914.

[103] *Id.* at 1914-15.

[104] *Id.* at 1915.

[105] *Id.*

[106] *Id.* at 1916-17.

2. Justice Kennedy

Making reference to the Court's reliance on *Irvin*, *Murphy* and *Patton*, wherein adverse pretrial publicity created a presumption of prejudice, Justice Kennedy believed that *Mu'Min* did not fall within the same category of cases.[107] He opined that the real issue should be directed to the question of the *actual* impartiality of the seated jurors: should their protestations of impartiality be believed?[108] He rejected Justice Marshall's contention that an individual exposed to publicity akin to that in *Irvin* should be disqualified regardless of how earnestly he professes his impartiality.[109] He did, however, agree with Justice Marshall that the *voir dire* in *Mu'Min* was inadequate.[110] He contended that a juror's admission of media exposure initiates a trial judge's duty to thoroughly assess that juror's ability to remain impartial.[111] In his view, this determination is largely one of demeanor and credibility.[112] He would have been satisfied if the trial judge in *Mu'Min* had questioned the jurors individually rather than in groups,[113] therefore assuring that their responses did not infect the remainder of the panel.[114] Under this analysis it appears that Justice Kennedy disagreed less with the result than with the method of achieving it.

ANALYSIS

The Court's analysis in *Mu'Min* was based on a thorough interpretation of impartiality-jurisprudence case law governing the Sixth and Fourteenth Amendments. The effect of the Court's decision was to make a distinction between appellate review procedures in state and federal cases.[115] It also attempted to set a standard by which courts may consider allowing any presumptions of prejudice to govern the *voir dire*.

Mu'Min and Constitutional Guarantees in State Criminal Trials

In *Mu'Min* the Court clearly refused to acknowledge any precedential value

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[107] *Id.* at 1918 (Kennedy, J., dissenting).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1919.

[113] *Id.* Initially, the judge questioned the jurors as a single group, later conducting *voir dire* in groups of four. Each group was asked about the effect on them of pretrial publicity or information, and whether they had formed an opinion. *Id.* at 1902-03.

[114] *Id.* at 1919 (Kennedy, J., dissenting).

[115] The majority acknowledges that the federal circuits that have mandated content questioning in pretrial publicity cases have done so in the exercise of their supervisory powers and not as a matter of constitutional law. *Id.* at 1905-06.

in the racial prejudice cases such as *Ristaino*, *Ham*, and *Turner*.[116] Thus it would seem as if the Court was suggesting that constitutional rights to impartiality and fairness protect only certain classes of prejudice, or extend only to certain groups in the population. Undoubtedly, one of the purposes of the Fourteenth Amendment was to prohibit the states from invidiously discriminating on the basis of race.[117] However, the main purpose of the due process clause is to insure the "essential demands of fairness."[118] Therefore, it follows that state incorporation of Fourteenth Amendment impartial jury principles[119] must be viewed more broadly than from a strict racial prejudice standpoint. A closer reading of these cases in terms of their general rules of law may suggest that the Court failed to scrupulously examine their overall similarities to *Mu'Min*.

In both *Ham* and *Ristaino*, the Court upheld the accused's right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind with respect to other races than the black race, and in relation to religious and "*other prejudices of a serious character*."[120] "Other prejudices of a serious character" could certainly include prejudice resulting from inflammatory pretrial publicity as in *Mu'Min*.

In *Ristaino*, the Court held that the inquiry into racial prejudice at *voir dire* was not constitutionally required because the facts of the case did not suggest a significant likelihood that such prejudice would infect the trial.[121] In *Ham*, the defendant's claim was that he had been framed because of his prominence in the community as a civil rights activist.[122] Racial issues, therefore, were inextricably bound up in the conduct of the trial because his reputation was likely to intensify any prejudice that individual jury members may have harbored.[123] *Ham* and *Ristaino* evoke the idea that under the Sixth and Fourteenth Amendments, "special circumstances" may suggest the need for specific questioning:[124] circumstances in which the particular prejudice sought to be avoided is inextricably bound up with the facts of the trial.[125]

Viewed under this broad spectrum, the more appropriate question in *Mu'Min*

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[116] *See supra* note 54 and accompanying text.

[117] *See* Slaughter-House Cases, 83 U.S. 36 (1872).

[118] Ham v. South Carolina, 409 U.S. 524, 526 (1973).

[119] The Sixth Amendment was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1948).

[120] Aldridge v. United States, 283 U.S. 308, 313 (1931) (emphasis added).

[121] Ristaino v. Ross, 424 U.S. 589, 598 (1976).

[122] *Ham*, 409 U.S. at 525.

[123] *Id.* at 524-26.

[124] *Ristaino*, 424 U.S. at 596.

[125] *Id.* at 597.

is whether any prejudicial pretrial publicity was inextricably bound up with the conduct of the trial. Clearly it was. The circumstances surrounding Mu'Min's case reveal a constitutionally significant likelihood of bias and partiality requiring judicial action.[126] The publicity contained detailed information regarding Mu'Min's criminal and institutional records as well as statements by political officials disgusted by the offense.[127] Political candidates used the case as a rallying call for reform such that Mu'Min came to symbolize in the press all that an outraged public thought wrong with the penal system.[128] The thrust of the articles was to expose Mu'Min's case as a prime example of societal evils. There were also numerous accounts regarding legislative and executive efforts to prevent prisoners from being permitted to work in urban areas.[129] Certainly any potential juror exposed to such propaganda could subconsciously have sought to hold Mu'Min out as an example; as an inspiration for the prosecutor to assuage public outrage and secure the death penalty. According to *Ham* and *Ristaino*, under the circumstances in *Mu'Min*, whereby the trial publicity was so entwined with an issue in the case, the "essential demands of fairness" embodied in the Sixth and Fourteenth Amendments required that Mu'Min's proposed questions[130] be asked. The predominant concern should have been the potential for media-induced bias to deny Mu'Min a fair and impartial jury under the circumstances.

Constitutional Bearing of Trial Judges' Opinions as to Juror Impartiality

The Court reasoned that Mu'Min was not entitled to relief because the trial judge found the jury panel impartial, and that this finding deserved great deference.[131] The Court's effort to extend comity to the state trial judge's assessment of the jurors' demeanors ignores the constitutional inadequacy of the inquiry that produced its findings.[132] Though the judge may have been aware of the content of the news stories, he could not have known precisely which stories the jurors themselves had been exposed to.[133] The majority agreed with the rule in *Patton* that credibility determinations made by trial judges deserve special deference. However, in *Patton*, the trial judge's finding of impartiality deserved heightened deference because it was made *only* after extensive *voir dire*

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[126] *See Mu'Min*, 111 S. Ct. at 1901-03.

[127] *Id.* at 1910-12 (Marshall, J., dissenting).

[128] *Id.*

[129] *Id.*

[130] Mu'Min's counsel submitted a list of proposed *voir dire* questions to determine when, what, where, how, and from whom information had been acquired about the case. *Id.* at 1902 n. 2.

[131] *Id.* at 1906.

[132] Mu'Min does not dispute the fact that a trial judge is best situated to determine an individual juror's competency to serve in a particular case. *Id.* at 1904-05.

[133] *Id.* at 1915 (Marshall, J., dissenting).

regarding the media accounts to which the jurors had been exposed.[134] It thus follows that there are circumstances under which the trial judge *must* conduct a probing *voir dire* regarding adverse pretrial publicity. Accordingly, Mu'Min correctly asserted that the adequacy of the judge's inquiry was not entirely unreviewable based on the danger of bias in pretrial publicity cases.[135] He contended that a trial judge's assessments of juror impartiality in cases involving adverse publicity should be reviewed on the basis of *adequacy under the circumstances*, not on the basis of "manifest error" as proposed by the Court.[136]

The majority also suggested that content questions will be necessary only when a community has been saturated by a "wave of public passion,"[137] as in *Irvin*.[138] The majority's argument misconstrues the point of *Irvin*. *Irvin* stood for the proposition that when a community has been subject to unrelenting prejudicial pretrial publicity, the *entire community* will be presumed both exposed to and prejudiced by it.[139] Similarly, Mu'Min argued that the publicity surrounding his trial was prejudicial enough to create a presumption of prejudice on the part of any individual juror representing the infected community conscience. This assertion is certainly validated by the jurors' responses during *voir dire*. Two of the jurors excused for cause admitted that they could not enter the jury box with an open mind.[140] It stands to reason that even one such admission of insurmountable partiality indicates the possibility of pervasive bias in the remainder of the panel.[141] Thus in *Mu'Min*, the likelihood definitely existed that a juror was jaundiced by prejudgment, mandating the state to screen out any other fixed opinions through rigorous content questioning.

Nonconstitutional Bases For Requiring Content Questions

First of all, the controversy unearthed in cases like *Mu'Min* portends the adoption of state laws designed to give trial courts more leeway so as to vouchsafe fair and impartial jury trials. The ABA standards[142] were cited with approval by the Supreme Court in *Nebraska Press Association v. Stuart*.[143] The majority in *Mu'Min* rejects the constitutional necessity of these standards because they do not necessarily require determination of a juror's state of mind upon

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[134] Patton v. Yount, 467 U.S. 1025, 1038 (1984).

[135] Reply Brief for Petitioner at 2-3, Mu'Min v. Virginia, 111 S. Ct 1899 (1991) (No. 90-5193).

[136] *Id.*

[137] Irvin v. Dowd, 366 U.S. 717, 728 (1961).

[138] *Mu'Min*, 111 S. Ct. at 1912-13 (Marshall, J., dissenting).

[139] *See Irvin*, 366 U.S. at 727-28.

[140] *Mu'Min*, 111 S. Ct. at 1903.

[141] *See* Turner v. Murray, 476 U.S. 28, 35-36 (1986).

[142] *See supra* note 82.

[143] 427 U.S. 539, 550 (1976).

exposure to highly prejudicial information.[144] However, the Court promulgated practically the same standards in *Patton*. It permitted a presumption of prejudice or partiality in the face of adverse publicity [145] without regard to a juror's actual state of mind.

Secondly, as demonstrated in *Sheppard*, trial judges do not always fulfill their duties to protect defendants from prejudicial publicity and disruptive influences in the courtroom.[146] Accordingly, "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused"[147] and permit content questioning during *voir dire*. The Supreme Court has recognized that trial judges have the power to prevent attorneys, court personnel, parties, and witnesses, from releasing information that would interfere with a fair trial.[148] Therefore, permitting content questions under potentially prejudicial circumstances merely serves to purge the trial from the unbridled publicity permitted initially by officers of the court.[149] Courts also have the power to grant continuances until the threat abates, to grant changes of venue, and to sequester the jury *sua sponte*.[150] Though none of the foregoing measures are anything more than palliatives, they represent the courts' alternatives to prevent frustration of its functioning fairly.

In deciding on methods of controlling the release of pretrial publicity, courts must also recognize "a strong societal interest in public trials,"[151] and balance it with the Sixth Amendment right of the defendant to a fair trial. As stated earlier, the Supreme Court has long noted the unreliability of prospective jurors' self-assessments of impartiality. In high publicity cases like *Mu'Min* conditions of *voir dire* may operate to inhibit candid responses from jurors who are likely to feel internal pressure to conform their answers to what they believe to be socially acceptable answers.[152] Also, in cases where there has been extensive pretrial publicity, jurors are likely to be unaware of their own biases because the

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[144] *Mu'Min*, 111 S. Ct. at 1908.

[145] *Patton*, 467 U.S. at 1031.

[146] Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[147] *Id.* at 362.

[148] *Id.* at 363.

[149] The Court's later decision in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), provides a marked contrast to *Mu'Min* on this point. It upheld a rule identical to Model Rules of Professional Conduct rule 3.6 prohibiting a defense lawyer from making extrajudicial statements to the press that "'he knows ... will have a substantial likelihood of materially prejudicing [the trial].'" *Id.* at 2720. In light of this holding, the Virginia Supreme Court's holding in *Mu'Min* is unconvincing.

[150] *Sheppard*, 384 U.S. at 363.

[151] Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

[152] Carroll, *Speaking the Truth: Voir Dire in the Capital Case*, 3 AM. J. TRIAL ADVOC. 199, 199-200 (1979).

very language used in the courtroom is constrained by legal meanings not evident to lay persons untrained in the law.[153]

In consideration of these potential interferences, the details of prospective jurors' exposure to pretrial publicity must be probed sufficiently to permit the court's fair determination of challenges for cause, and to provide counsel an opportunity to preserve a record for appeal.

CONCLUSION

The crux of the problem presented in *Mu'Min* lies in applying the accused's right to a fair trial by an impartial jury to the administration of criminal justice in the state and federal courts. The tenor of skepticism exuded in *Mu'Min* reveals the Court's reluctance to stray from strict, facial constitutional guarantees. In the words of Lord Coke, a juror must be "indifferent as he stands unsworn,"[154] the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury."[155]

Notwithstanding the Justices' divergent approaches in analyzing the content question issue in *Patton*, *Irvin*, and now *Mu'Min*, permanently-imbedded fragments of constitutional adjudication have emerged unscathed. It is established practice in the federal system that a prospective juror is presumed to be prejudiced and should be excused when that juror has become aware, through extrajudicial sources, that the defendant has a prior criminal record.[156] But - and this is well-established - nothing in the Constitution compels the states' trial courts to adopt a presumption of prejudice because such adoption is based on the Court's federal supervisory powers.[157] Thus, a state trial court's failure to employ the presumption is not cognizable error.[158]

There is some support for the notion that prejudice can be presumed regardless of whether the trial took place in federal or state court. However, this is only permitted when pretrial publicity is so pervasive, inflammatory, and widespread that the trial becomes "but a hollow formality."[159] *Mu'Min* leaves

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[153] *Id.* at 207-13.

[154] Reynolds v. United States, 98 U.S. 145, 154 (1878).

[155] Turner v. Louisiana, 379 U.S. 466, 472 (1965).

[156] Britz v. Thieret, 940 F.2d. 227, 231 (7th Cir. 1991). The court of appeals affirmed Britz's murder conviction. Britz argued that the Illinois trial court had committed reversible error by declining his requests for individual *voir dire* of each prospective juror outside the presence of the others. *See* People v. Britz, 185 Ill. App. 3d. 191, 200, 541 N.E.2d 505, 511 (1989).

[157] Murphy v. Florida, 421 U.S. 794, 797-99 (1975).

[158] *Britz*, 940 F.2d at 231.

[159] Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

unaddressed the question of how to assure a greater degree of scrutiny during *voir dire* in high publicity capital murder cases at the state level. Perhaps this is a job for state legislatures to handle.

In sum, as in *Mu'Min* where a defendant's life is at stake, it is not requiring too much that he be tried in the most impartial atmosphere possible. Therefore, states must work to assure reliability in the process by which a person's life is taken and require content questions in hyper-publicity cases. The only way to inject this element is to recognize that the right to challenge has little or no meaning unaccompanied by preservation of a defendant's right to prove actual bias through relevant, probing questions.

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